No. 332.
Brf. of Simmons for Appellees
(on ms.)
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 332.

HENRY B. F. MACFARLAND ET AL.

vs.

EUGENE BYRNES ET AL.

MOTION TO DISMISS.

LEO SIMMONS,
Attorney for Appellees.

LAW REPORTER CO., PRINTERS, 518 FIFTH ST., WASHINGTON D. C.

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Now come the appellees, represented of record by Attorney Leo Simmons and move the court to dismiss the appeal in this case.

First. Because there has been no final judgment or decree entered in the case by the lower court.

Second. Because the decree of the Court of Appeals, from which this appeal is taken, was in favor of the appellants, reversing the court below and remanding the case for further proceeding, and, therefore, no appeal lies to this court from same (Rec., p. 78).

Section 233 of the District of Columbia Code of Laws, which took effect January 1, 1902, allows an appeal from the Court of Appeals only from final judgments or decrees. The Court of Appeals, in delivering its opinion appealed from, said (Rec., p. 78):

> "This court therefore should not direct any final order or decree to be entered by the court below in the premises."

And said court further said (Rec., p. 78):

> "If, on the other hand, they (the appellees) elect to further contest the matter according to law, they should have the option to do so."

So it will be seen that the law of this case has not been settled in the court below and a final judgment or decree entered, and, until it is, no appeal will lie to this court.

French *vs.* Shoemaker, 12 Wall. (U. S.) 86.
North Carolina RR. *vs.* Swasey, 23 Wall. (U. S.) 405.

> "They [the authorities] are uniform, [says Mr. Chief Justice Waite in Dancase *vs.* Kendall, 119 U. S. 53], to the effect that a decree to be final for purposes of appeal, must leave the case in such condition, that if there be an affirmance here, the court below will have nothing to do but to execute the decree it has already entered."

Cited and approved in the case of Lodge *vs.* Twell, 135 U. S. 232.

Cited in the case of Guarantee Co. *vs.* Mechanics' Savings Bank and T. Co., 173 U. S. 582.

See, also, Gibbons *vs.* Ogden, 6 Wheat. (U. S.) 448.

The decree in this case is in no possible way a final decree. The appellees could not have appeal from said decree, and as the record now stands, it appears to me, they can not properly present their side of the case for review.

What can this court do in the premises? It cannot reverse the Court of Appeals; if it did, it would be against the appellants, who seek to have a different ruling. All it can do is to give its opinion as to whether or not the lower court is right in its construction of the law, to the extent it has decided same.

Respectfully submitted.

LEO SIMMONS,
Attorney for Appellees.